# 93-982

No.

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## In the Supreme Court of the United States

OCTOBER TERM, 1993

STEPHEN C. VIERRETHER, *Petitioner*,

*v.*

UNITED STATES, *Respondent*.

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does § 212 of the Coast Guard Authorization Act of 1989 apply to cases that were pending before the Board for Correction of Military Records of the Coast Guard when it took effect on June 12, 1990?

2. If so, does a favorable decision of the BCMR become final agency action and fix an applicant's right to relief under 10 U.S.C. § 1552 upon expiration of the statutory 10-month deadline?

3. May an agency avoid the rule that it is bound by its own regulations by "suspending" a regulation merely because its observance has become inconvenient?

4. Does the stigma of a reenlistment code that bars reentry into any branch of the armed forces and adversely affects private employment trigger the due process right to a hearing?

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# In the Supreme Court of the United States

OCTOBER TERM, 1993

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STEPHEN C. VIERRETHER, *Petitioner*,

*v.*

UNITED STATES, *Respondent*.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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Stephen C. Vierrether,[1] formerly a Chief Boatswain's Mate in the United States Coast Guard, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case. The case raises important questions regarding the application of procedural legislation to pending cases, the consequences of an agency's failure to comply with a statutory deadline which was specifically enacted to combat agency footdragging, the due process right to a hearing in connection with stigmatizing military reenlistment codes, and the power of an agency to "suspend" regulations that become inconvenient for a while.

### Opinions Below

The Court of Appeals' *per curiam* affirmance, 6 Fed.3d 786, is reproduced in the Appendix ("App.") at 1a.

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[1] Chief Vierrether's name is pronounced "Vuh-*ree*-thur."

Its order denying rehearing and declining rehearing *en banc* is at App. 3a. The judgment and decision of the Court of Federal Claims, 27 Fed. Cl. 357 (1992), are at App. 5a and 26a.

## Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988). The judgment of the Court of Appeals was entered on September 8, 1993. A timely petition for rehearing was denied on October 14, 1993.

## Constitutional, Statutory and Regulatory Provisions

The Fifth Amendment provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

Section 1169 of title 10, U.S. Code, provides:

> **§ 1169. Regular enlisted members; limitations on discharge**
>
> No regular enlisted member of an armed force may be discharged before his term of service expires, except—
>
> (1) as prescribed by the Secretary concerned;
> (2) by sentence of a general or special court-martial; or
> (3) as otherwise provided by law.

The military record correction statute, 10 U.S.C.A. § 1552 (West Supp. 1993) provides in pertinent part:

> (a)(1) The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. Except as provided in paragraph (2), such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department. The Secretary of Transportation may in the same manner correct any military record of the Coast Guard.
>
> * * *
>
> (4) Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

Section 212 of the Coast Guard Authorization Act of 1989, Pub. L. No. 101-225, 103 Stat. 1914, *reproduced in* 10 U.S.C.A. § 1552 note (West Supp. 1993) ("§ 212") directed the Secretary of Transportation ("the Secretary"), not later than June 12, 1990 (six months after enactment on December 12, 1989) to—

> (1) amend part 52 of title 33, Code of Federal Regulations, governing the proceedings of the [Board for Correction of Military Records ("BCMR")] to ensure that a complete application for correction of military records is processed expeditiously and that final action on the application is taken within 10 months of its receipt; and

> (2) appoint and maintain a permanent staff, and a panel of civilian officers or employees to serve as members of the [BCMR], which are adequate to ensure compliance with paragraph (1) of this subsection.
>
> The BCMR's regulations provide:
>
> . . . Section 212 of the Coast Guard Authorization Act of 1989 provides that the Secretary shall ensure that final action on a complete application for correction is taken within 10 months of its receipt.

33 C.F.R. § 52.2(a) (1993).

At the time of petitioner's discharge, § 6-L-1 ("Desirability of Retention in the Coast Guard—Administrative Discharge Board") of the Coast Guard's Administrative Investigations Manual ("AIM") provided, in pertinent part:

> 1. *General.* Enlisted personnel of the Coast Guard may not be separated from the service with an other than honorable discharge unless they have been provided the opportunity to appear before an administrative discharge board. Similarly (with a few exceptions), enlisted personnel of the Coast Guard with more than 8 years total service may not be denied reenlistment, or be separated prior to the end of an enlistment, unless they have been provided the opportunity to appear before an administrative discharge board. . . .

Article 12-B-5 ("Processing Procedures for Personnel Not Eligible for Reenlistment") of the Coast Guard's Personnel Manual ("Personnel Manual") provides, in

pertinent part:

> c. A member with 8 or more years of total active and/or Reserve military service shall be notified, in writing, . . .
>
> (2) That the member has the right to present the case and appear in person before a reenlistment board.

Article 12-B-9 ("Processing Procedures for Unsatisfactory Performers") of the Personnel Manual provides, in pertinent part:

> d. *Procedures for Notification of Unsatisfactory Performers.*
>
> (1) A member whose record of performance (12 months are preferred in majority of cases, but not less than 6 months for extremely poor performance cases) is such that he/she could be eligible for discharge under the provisions of this article must be notified in writing that a discharge by reason of unsatisfactory performance may result if the unsatisfactory performance trend continues for the next 6 months. [Form notification letter omitted.]
>
> * * *
>
> e. *Discharge Processing.*
>
> (1) *Procedures for Notification of Discharge.* After notification of unsatisfactory performance and after further close observation of

> the member (in most cases for 6 months), if there has not been a substantial improvement in the member's performance he/she will be notified in writing of the proposed discharge action. The official notification will be in letter form according to the following sample:
>
> * * *
>
> (c) You have the right to present your case and appear in person before an administrative discharge board. (Omit for members with less than 8 years Regular or Reserve service).

## Statement of the Case

Congress has provided that regular enlisted personnel may be discharged before the end of their enlistment only as prescribed by the Secretary concerned, by sentence of a general or special court-martial, or as otherwise provided by law. 10 U.S.C. § 1169 (1988). By regulation, Coast Guard enlisted personnel with over eight years' service cannot be discharged prior to the end of an enlistment unless they are afforded a trial-type hearing before an administrative discharge board. Personnel Manual art. 12-B-9; AIM § 6-L-1.

In early 1988, fearing budget cuts, the Coast Guard decided to reduce expenses. One of the steps it took was to offer "early-outs." When this did not generate the desired response, it resorted to an involuntary discharge program under which the right of personnel with more than eight years' service to an administrative discharge board was "suspended." On June 2, 1988, Chief Vierrether was discharged under this program, despite the fact that his enlistment was not due to expire until August 29, 1990, and

even though his superiors did not consider his performance to be such as to warrant proceedings to discharge him. At the time of his discharge, he had 17 years, 11 months and three days' service. It is undisputed that if he had had 18 years' service, he would have been permitted to remain on active duty long enough to qualify for retirement.

Having produced a sufficient number of discharges, the involuntary discharge program was terminated in May 1988.

Chief Vierrether received an honorable discharge, but a reenlistment eligibility classification code of "RE-4." Such a code renders a person ineligible for reenlistment in any branch of the military and adversely affects civilian employment opportunities. Robert H. Joost & Nancy Battaglia, *The Board for Correction of Military Records of the Coast Guard: A Unique Dispute Resolution Mechanism*, 41 Ad. L. Rev. 441, 453 n.47 (1989).

Immediately after his discharge, Chief Vierrether sought relief from the BCMR under 10 U.S.C. § 1552. That statute requires the Secretary to act through boards of civilians when ruling on record-correction applications. Unless procured by fraud, corrections under § 1552 are final and conclusive on all officers of the United States. *Id.* § 1552(a)(4). The statute does not require the Secretary or anyone acting on his behalf to review the BCMR's decisions. Only those categories of cases in which the Secretary, by regulation, provides that there be further review after the BCMR has acted are subject to such review. While the Department of Transportation ("DOT") has chosen to provide for secretarial review in some types of cases, 33 C.F.R. § 52.64 (1993), the lion's share—approximately 95%—of BCMR decisions are not subject to any further review within DOT once the board has acted. 55 Fed. Reg. 18001, 18002 (1990); Joost & Battaglia, *supra*, at 457 n.56, 458 n.60. RE codes in particular "are rarely involved in review by the delegate of the Secretary." *Id.* at 459.

Before the BCMR, Chief Vierrether argued, among other things, that the Coast Guard was bound by its regulations, that he had a right to a hearing before an administrative discharge board, and that the program under which he was discharged did not meet the Personnel Manual's requirements for a convenience of the government discharge. His request for a hearing before the BCMR was denied, but the board unanimously ruled for him on the merits, finding that the Coast Guard had violated its discharge regulations by not affording him a hearing before an administrative discharge board. It also found that the Coast Guard had committed an injustice in not granting him the same right to serve through retirement eligibility as it afforded to those who had served 18 years. App. 27a.

Dates are important in this case. The board decided the case on or before December 13, 1989. On February 7, 1990, a DOT Assistant General Counsel commented on the board's decision.[2] After receiving further submissions from the parties in light of those comments, the board (on a date the government has advised us it is unable to determine) handed down a second decision unanimously holding that Chief Vierrether had been wrongly denied the right to a hearing under the AIM. App. 32a. It ordered that his discharge be voided, that his record be corrected to show that he served continuously for 20 years, at which time he retired, and that he be paid whatever is due him as a result. DOT's Deputy General Counsel disapproved this decision and denied Chief Vierrether's application on April 18, 1991. App. 41a. This was more than 10 months after the requirements of § 212 took effect.

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[2] The Court of Federal Claims mistakenly attributed this action to the *Deputy* General Counsel. App. 9a n.4.

| | |
|---|---|
| June 2, 1988 | Date of discharge |
| June 3, 1988 | Application filed with BCMR |
| December 12, 1989 | § 212 signed into law |
| December 13, 1989 | BCMR's first decision |
| June 12, 1990 | § 212 takes effect |
| post-July 20, 1990 | BCMR's second decision (precise date unknown) |
| **April 12, 1991** | **Expiration of § 212 deadline for final agency action** |
| April 18, 1991 | Deputy General Counsel's decision reversing BCMR |

Chronology of Agency Action

The Court of Federal Claims dismissed Chief Vierrether's Tucker Act complaint, 27 Fed. Cl. 357 (1992), App. 5a, holding that his discharge was authorized under the Personnel Manual, App. 11a-14a, that there was no right to a hearing, *id.* 14a-19a, and that an RE-4 reenlistment code is not stigmatizing. *Id.* 19a-23a. The court further held that because his BCMR application was filed before passage of § 212, that statute—whatever its effect—did not apply. *Id.* 24a. The Court of Appeals affirmed without opinion. *Id.* 1a.

## Reasons for Granting the Writ

Certiorari should be granted because the decisions below violate this Court's precedents regarding (1) the application of new procedural legislation to pending cases, (2) the consequences of an agency's failure to act within a statutory deadline, and (3) the binding character of agency regulations. In addition, certiorari should be granted to review the important and unresolved constitutional issue of whether a reenlistment code that bars reenlistment and adversely affects civilian employment is stigmatizing for purposes of the due process right to a hearing.

I

## THE DECISION BELOW CONFLICTS WITH *BRADLEY v. RICHMOND SCHOOL BOARD*, *BROCK v. PIERCE COUNTY*, AND *SERVICE v. DULLES*

The Court of Appeals erred because the special deadline Congress imposed on DOT plainly applies to BCMR cases that were pending on June 12, 1990 and rendered the BCMR's decision final when the statutory period expired without action by the Deputy General Counsel. It also erred because the Coast Guard had no right to suspend the regulations under which career enlisted personnel such as Chief Vierrether enjoy the protection of a trial-type hearing before they may be discharged prior to the end of their enlistment. These are important and recurring issues, since Chief Vierrether is not the only Coastguardsman whose favorable BCMR decision the Deputy General Counsel has attempted to overturn despite expiration of the statutory deadline. Nor, given the decision below and the substantial prospect of austerity budgets in the future, is there anything to prevent the Coast Guard or any of the other armed services from suspending the right to an administrative discharge board the next time they fear a budget cut. The career enlisted personnel on which the military depends are entitled to better. They have as much right to insist that agencies adhere to their own regulations as do broadcasters, electric utilities and everyone else in our society whose affairs are affected by government.

A

## SECTION 212 APPLIES TO CASES PENDING ON JUNE 12, 1990

Section 212 imposed a ten-month deadline for decisions on applications to the Coast Guard BCMR. It was passed in response to a pattern of lengthy agency delays, and directed the Secretary, not later than June 12, 1990 to the BCMR's regulations to ensure that complete applications are processed expeditiously and that final action is taken within 10 months of their receipt. Section 212 also required the Secretary to "appoint and maintain a permanent staff, and a panel of civilian officers or employees to serve as members of the [BCMR], which are adequate to ensure compliance with" the 10-month requirement.

This petition presents two related issues under § 212. First, does it apply to BCMR cases that were pending on June 12, 1990, and second, if it does, may DOT overturn a BCMR decision in an applicant's favor *after* the 10-month period has expired? The courts below saw no need to reach the second issue because of their incorrect approach to the first.

These issues are worthy of a grant of certiorari. The government has appealed two cases holding that § 212 is preclusive to the Court of Appeals for the District of Columbia Circuit. *Gazlay v. Busey*, 819 F. Supp. 29 (D.D.C. 1993) (Greene, J.), *and Gottlieb v. Peña*, Civil No. 92-1667 (D.D.C. Apr. 26, 1993) (Jackson, J.), *consolidated appeal pending sub nom. Gottlieb v. Peña*, Nos. 93-5182 & 93-5183 (D.C. Cir.). A decision on § 212's applicability to cases pending on June 12, 1990 would also affect an unknown number of other cases. One Coast Guard BCMR case has been pending for nearly six years. H.R. Rep. No. 146, 103d Cong., 1st Sess. 18 (1993). Absent a determination that the § 212 "clock" also runs as to pending cases, there is every reason

to fear that DOT will continue to allow however many of these old cases there are to remain in limbo. Even if these applicants ultimately prevail, the difficulty of fashioning effective make-whole relief when there is a prolonged gap in a service-member's record, training and experience is self-evident.

More broadly, certiorari is appropriate to help clarify the applicability of new procedural requirements to pending cases. By the time the § 212 regulations were required to be promulgated, on June 12, 1990, Chief Vierrether's application had been pending more than two years. Because it is a procedural measure and does not unfairly upset settled expectations or contractual arrangements, § 212 clearly applies to such a case.

Neither of the courts below cited any authority for holding that § 212 does not apply to cases pending on June 12, 1990. The only opinion is that of the Court of Federal Claims, which reasoned that

> [t]he plaintiff filed his petition with the Coast Guard BCMR on June 3, 1988. The legislation became effective on December 12, 1989. If the court applied the 10-month rule, the deadline for final BCMR action would have expired on April 2, 1989. Thus, by the time the rule came into being, the 10-month deadline for a BCMR decision had already passed. It would be illogical to withdraw the BCMR's authority to render a decision just because the BCMR failed to meet a deadline that did not exist at the time. . . . App. 24a.

This treatment of the matter is entirely wrong. It obviously would make no sense to construe § 212 as if the 10-month period ran before it even took effect. We made no such argument. For cases such as this, which were pending

when the measure took effect, the period is to be calculated from that date, not some earlier date. By this conservative and proper standard, Chief Vierrether is entitled to the benefit of § 212.

The decision below is contrary to *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), and irreconcilable with the views expressed by the United States and the Equal Employment Opportunity Commission as *amici curiae* in *Landgraf v. USI Film Products*, No. 92-757, and *Rivers v. Roadway Express, Inc.*, No. 92-938. Citing *Bradley*, the government there suggested (at 8)

> a rule that is both fair and consistent with Congress's purpose in enacting new legislation: when Congress has not prescribed how new statutes are to be applied to pending cases, substantive provisions (such as those prohibiting conduct that was not illegal before) should not be applied to pending cases. On the other hand, procedural and remedial provisions may be applied to pending cases unless doing so would result in "manifest injustice."

Like the statute for the correction of military records, 10 U.S.C. § 1552,[3] § 212 is remedial legislation. Setting a time limit for final agency action is unquestionably a matter of procedure. It certainly cannot be treated as substantive, since it does not make illegal military personnel actions or records that previously would not have constituted an error or injustice under § 1552. But even if § 212 were deemed substantive, as the government implau-

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[3] *See Kalista v. Secretary of the Navy*, 560 F. Supp. 608, 611 (D. Colo. 1983), *citing Oleson v. United States*, 172 Ct. Cl. 9 (1965); 40 Op. Att'y Gen. 504, 508 (1947).

sibly maintained below, calculating the 10-month period only from June 12, 1990 affords DOT the full benefit of the six-months-long "heads up" which Congress built into § 212. Applying § 212 in this fashion to cases that were pending on that date scarcely results in "manifest injustice" to the agency. This is especially true here because Chief Vierrether's application had been filed over two years before June 12, 1990, and DOT therefore actually had far more than 10 months in which to complete its task.

Under the Solicitor General's approach in *Landgraf*, with which we basically agree, "the first step is to determine, if possible, what Congress intended." Looking at the statutory text, the 1989 Act of which § 212 was part, was, with exceptions not here relevant, effective upon approval. Pub. L. No. 101-225, § 309, 103 Stat. 1926. Section 212, however, imposed obligations on DOT that would only take effect six months later, on June 12, 1990. Nothing in the statutory text or DOT's implementing regulation, 33 C.F.R. § 52.2(a) (1993), *supra* p. 4, excludes cases that would be pending on that date, whether filed before or after the date the statute itself became law.

The government's *Landgraf* brief correctly observed (at 17) that "[i]n the absence of clear evidence of congressional intent, it is proper for courts to presume that procedural and remedial provisions apply to pending cases" (capitalization deleted). Nothing in the legislative history of § 212 suggests that Congress did not intend it to apply to pending cases. This is not surprising since pending cases were the reason the measure was passed in the first place. To deny its benefit to the cases that gave rise to it would directly frustrate Congress's efforts. Indeed, not applying § 212 to pending cases denies its benefit to the very applicants who need it most: those with the oldest cases.

As remedial legislation, § 212 should be read generously for the benefit of those it was intended to aid: applicants. "[T]he nature and identity of the parties" are

pertinent to whether the measure should be applied to pending cases. *Landgraf, supra*, 968 F.2d 427, 432 (5th Cir. 1992). Here, the applicant is a member of a class for which the cases indicate an unusual measure of solicitude. *E.g., King v. St. Vincent's Hospital*, 112 S. Ct. 570, 574 n.9 (1991), *citing Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

On the other hand, applying § 212 to pending cases would in no sense disturb settled expectations worthy of judicial sanction. The Deputy General Counsel had no reason to expect she could review cases such as Chief Vierrether's without regard to the passage of time. Thus, the Administrative Procedure Act ("APA"), which governs BCMR proceedings, *e.g., Neal v. Secretary of the Navy*, 639 F.2d 1029, 1037 (3d Cir. 1981), imposes on agencies a duty to conduct the public business with reasonable dispatch. 5 U.S.C. § 706(1) (1988). Litigation under that provision, *Moore v. Board for Correction of Military Records of the Coast Guard*, Civil No. 87-2689 (D.D.C. 1988) (dismissed per stipulation), *noted in Gazlay, supra*, at 30, which is also referred to in the legislative history of § 212 and was settled shortly before Chief Vierrether's application was filed, directly alerted DOT to the fact that it needed to expedite its BCMR process. If § 212 required readjusting priorities within DOT's Office of General Counsel, the department had ample time to do so as a result of the six-month delay Congress built in.

The Court should hold this petition in abeyance pending decision in *Landgraf* and *Roadway Express*. Once they have been decided, it may wish to grant, vacant and remand this case for further consideration.

B

## WHEN THE STATUTORY PERIOD EXPIRED, THE BCMR DECISION BECAME FINAL AGENCY ACTION AND FIXED CHIEF VIERRETHER'S RIGHT TO RELIEF

Since Chief Vierrether was entitled to the benefit of § 212, the next question is whether that measure precluded the Deputy General Counsel's attempt to reverse the BCMR because she acted more than 10 months after June 12, 1990. The only cases to have addressed this issue so hold. *Gazlay v. Busey, supra*; *Gottlieb v. Peña, supra*. Those cases properly apply *Brock v. Pierce County*, 476 U.S. 253 (1986). The courts below did not reach this issue in light of their incorrect holding that § 212 does not apply to cases that were pending on June 12, 1990.

Under *Pierce County*, congressional establishment of a deadline, "*standing alone*, is not enough to remove" an agency's power to act after the deadline. 476 U.S. at 262. At the same time, however, the Court cautioned that

> [w]e need not, and do not, hold that a statutory deadline for agency action can never bar later action unless that consequence is stated explicitly in the statute. In this case, we need not go beyond the normal indicia of congressional intent to conclude that [the statute there at issue] permits the Secretary to [act] after the . . . deadline has expired.

*Id.* at 262 n.9. It went on to examine the purpose and legislative history of the measure before it when concluding that disregard of the deadline at issue did not terminate the agency's authority. In *United States v. James Daniel Good Real Property*, No. 92-1180 (U.S. Dec. 13, 1993), slip op. 21,

the Court again recognized the need to consider the specific "structure and history" of statutory timing provisions when deciding the consequences of agency violations. Under this approach, which is properly attentive to the background and purposes of legislation, § 212 must be afforded the effect we ascribe to it.

As Judge Greene observed in *Gazlay*,

> here Congress clearly intended to set a mandatory deadline for agency action. The deadline was not merely a minor piece of a larger integrated Act. Section 212 of the Authorization Act was a narrowly targeted piece of legislation passed for the sole purpose of ending Coast Guard BCMR delays. *See* H.R. Rep. No. 227, 101st Cong., 1st Sess. 32-33. Nor was this generic legislation. No such deadline is imposed on the review boards of other agencies such as the Army or Navy. As the House Report makes apparently [*sic*; presumably should read "abundantly"] clear, in enacting section 212 Congress wished to end the long delays accompanying action by the Coast Guard BCMR. In light of the legislative history, it cannot be disputed that Congress intended the ten month limit to be a mandatory deadline.

819 F. Supp. at 31. He correctly added that "when the BCMR resolves the application within the Congressionally-mandated window, the decision should be found to be a final decision. Beyond the ten-month period, the agency was without authority to take further action." *Id.* (footnote omitted).

Judge Greene's analysis, adopted by Judge Jackson in *Gottlieb*, is unassailable. With legislation such as this,

which is addressed explicitly and uniquely to the problem of delay by this particular agency, and which deals with *final* agency action rather than "internal timing requirements" such as those at issue in *Pierce County* or *Good Real Property*, a court that demands an *in haec verba* statutory articulation of the precise consequences of a failure to meet the deadline trifles with the legislative process and would plainly frustrate congressional intent. The fact that only *this* correction board (and not those for the Army, Navy/Marine Corps, Air Force and Public Health Service) has been subjected to a statutory time limit is strong evidence that § 212's deadline is not a mere procedural milepost, as in *Pierce County* or *Good Real Property*, or legislative exhortation that DOT try to work faster, but rather a reflection of abiding congressional concern that the substantive rights of Coast Guard personnel were being eroded through inordinate delay.[4] This unique legislative background is the very kind of evidence that takes the case out of the normal rule; the § 212 deadline does not "stand[] alone." *Pierce County*.

As explained in *Gazlay*, when Congress passed § 212, it acted in the knowledge that the *Moore* litigation under the APA's unreasonable delay provision had proven ineffective in obtaining prompter action by this particular BCMR. That litigation was specifically referred to in the legislative history. H.R. Rep. No. 227, *supra*, at 32-33, *reproduced in*

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[4] The fact that § 212 was enacted to confer a benefit on BCMR applicants rather than on the government further serves to distinguish it from internal timing requirements such as those at issue in *Good Real Property*, where the Court properly observed (at 21-22) that "[i]t would make little sense to interpret directives designed to ensure the expeditious collection of revenues in a way that renders the Government unable, in certain circumstances, to obtain its revenues at all." Far from frustrating a congressional purpose, as would have been the result had Good prevailed on this part of his case, Chief Vierrether's reading of § 212 directly serves the congressional purpose.

1989 USCCAN 1393-94; *see also* 135 Cong. Rec. H9310-11 (daily ed. Nov. 21, 1989).

Congress's awareness of the *Moore* litigation and the depth of congressional concern over Coast Guard BCMR delays are also apparent from a letter the Chairman and Ranking Member of the House Merchant Marine and Fisheries Committee submitted in response to DOT's notice of proposed rule making under § 212. App. 47a-49a. They strenuously objected to a proposed rule that would have eviscerated the 10-month deadline by providing that an application would not be deemed to have been filed (the triggering event under § 212) until not only the applicant's own basic submission and any applicable service and medical records were in hand, but also until the Coast Guard had submitted its views, the applicant had responded, and any hearing was completed. This was directly contrary to congressional intent as expressed in a section-by-section analysis published in the *Congressional Record*, and DOT relented in the (untimely) final version of the rule. 55 Fed. Reg. 31043 (1990). The episode is revealing not only as to this agency's hostility to what Congress set out to do, *see* Robert H. Joost & Nancy Battaglia, *Correcting Coast Guard Records*, 116 Naval Inst. Proc. 115, 117 (1990) (urging repeal of 10-month deadline),[5] but also as to Congress's refusal to close its eyes to DOT's transparent effort to thwart the purpose of the legislation.

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[5] The authors of this article are the chair and deputy chair of the BCMR. While they write in their private capacity, their argument for repeal bespeaks a recognition that expiration of the 10-month period has preclusive effect. Actions taken in their official capacity also indicate that the deadline is a real one from which real consequences flow, rather than merely an aspiration it would be nice to achieve. Thus, the BCMR routinely advises applicants who seek more than the allotted 15 days in which to reply to Coast Guard advisory opinions, 33 C.F.R. § 52.82(d) (1993), that the 10-month deadline will be delayed on a day-for-day basis for any delay they seek.

In light of this history, there can be no doubt as to Congress's intent. Nonetheless, since neither of the courts below reached this issue, the Court may wish, rather than deciding the matter itself in the first instance, to include in the remand suggested in connection with the first Question Presented a direction that the Court of Appeals also decide whether the 10-month deadline insisted upon by Congress is preclusive, as held in *Gazlay* and *Gottlieb*, and therefore entitles Chief Vierrether to the relief he was afforded by the BCMR.

## C

## AN AGENCY MAY NOT "SUSPEND" A REGULATION CONFERRING THE RIGHT TO A HEARING MERELY BECAUSE IT HAS BECOME INCONVENIENT

The Court of Appeals did not even attempt to explain why the Coast Guard could suspend the regulations under which Chief Vierrether was entitled to a hearing before an administrative discharge board. For its part, the Court of Federal Claims relied on the notion that the Commandant of the Coast Guard "has the authority to modify his own directives" and that suspending a regulation is no different from replacing or cancelling it. App. 17a. For these propositions it cited neither statute nor case law.

The trial court's theory was plainly wrong. Permitting an agency to suspend regulations as important as those here at issue merely because they have temporarily become inconvenient, only to reimpose them after the inconvenience has passed, is at war with the principle of government under law. An agency is bound by its regulations. *E.g., Service v. Dulles*, 354 U.S. 363 (1957); *Vitarelli v. Seaton*, 359 U.S. 535 (1959). There is no more fundamental concept in federal administrative law.

The Coast Guard had no authority to suspend the regulations under which personnel with over eight years' service had a right to a predischarge trial-type hearing. Neither the APA nor title 14 of the United States Code confers on it a power to suspend regulations. *See* 5 U.S.C. § 301 (1988) (heads of departments "may prescribe regulations"); 14 U.S.C. § 632-33 (1988) (Commandant may "issue" rules, orders and instructions and "promulgate" regulations and orders). Nor can the Coast Guard *change* procedural regulations to its members' detriment with respect to past conduct, *see Arizona Grocery Co. v. Atchison, T. & S.F. Ry.*, 284 U.S. 370, 389 (1932), *discussed in* Alfred C. Aman, Jr. & William T. Mayton, *Administrative Law* 308-09 & nn.5-6 (1993). It certainly cannot turn a regulation on and off as if it were a household appliance. That is what happened here.

The Court of Federal Claims sought to avoid this by theorizing that

> the effect of ALCOAST 22/88 was to replace [P]ersonnel [M]anual article 12-B-9 with a provision continuing the right to an administrative discharge board for most members but excepting those members targeted for discharge under the RIF program. App. 17a.

The short answer is that this is simply not what happened as a matter of history. The Coast Guard never amended Article 12-B-9 or replaced it with anything else. It did not issue a *new* regulation attempting to dispense with the right to a hearing for personnel "over eight." Instead, it merely decided that it was inconvenient to comply with the hearing provisions of the Personnel Manual and AIM. Neither the government nor either of the two courts below was able to point to any case that permits such action.

To say, as the Court of Federal Claims did, that it is "as if" the Coast Guard had issued a new regulation that kept the right to a hearing for everyone but those who were being deprived of it under the involuntary discharge program is transparently circular and makes a mockery of the principle that an agency is bound by its regulations. An agency's violation of its regulations cannot be forgiven by the simple expedient of treating them "as if" they had been rewritten so they no longer applied to the very persons as to whom they are being violated. In another context, such an approach would be dismissed as "at best, facetious." *See Bowers v. Hardwick*, 478 U.S. 186, 194 (1986).

The Coast Guard's "suspension" of its own hearing requirements is the antithesis of procedural regularity. It proceeded on the assumption that its own convenience can take higher priority than the rights of the individual provided only that it takes the trouble to gives its actions a semblance of legality. The *trompe l'oeil* technique is fine for painting, but has no place in a system of law. Indeed, in a very real sense, a fig-leaf such as that deployed by the Coast Guard is even worse than other species of agency disregard for binding regulations since it trades on appearances and, in so doing, debases public respect for government as a whole.

The rule that an agency is bound by its regulations is fundamental and cannot be evaded by invoking a power of suspension. Given the decision below and the prospect of additional austerity budgets in the future, the Coast Guard is likely to repeat itself unless this Court intervenes.

## II

## THE DECISION BELOW RAISES AN IMPORTANT CONSTITUTIONAL ISSUE REGARDING THE RIGHT TO A HEARING THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT

Absent some contrary statute or regulation or conviction by a court-martial, Chief Vierrether had a right to serve to the end of his enlistment. 10 U.S.C. § 1169 (1988). His livelihood as well as his reputation were harmed by his premature discharge because the RE-4 code bars reentry into any branch of the armed services and adversely affects civilian employment. As a result, he had a due process right to a predischarge hearing. *See Paul v. Davis*, 424 U.S. 693, 708-10 (1976); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542-45 (1985).

Adverse RE codes are issued to many departing servicemembers each year. They are widely understood to be stigmatizing. *E.g., Keef v. United States*, 185 Ct. Cl. 454, 467 (1968); *Rogers v. United States*, 24 Cl. Ct. 676, 684 n.14 (1991), *aff'd mem.* 996 F.2d 317 (Fed. Cir. 1993). The test is whether the discharge "albeit honorable, either casts a stigma on the serviceman *or* has some derogatory connotation." *Keef, quoted in Rogers, supra*, at 684 (emphasis added).

RE-4 codes in particular are clearly stigmatizing. As the chair and deputy chair of the BCMR have written,

> [t]he Coast Guard, like the other military services, assigns a reenlistment code rating to each person whom it discharges from active duty. An RE-1 code means the person is eligible to reenlist, but an RE-4 code means he or she is not eligible to reenlist. *All of the military services, the National Guard and*

> *Reserves, and some private employers tend to reject applicants who have received an RE-4, regardless of circumstances.*

Joost & Battaglia, *The Board for Correction of Military Records of the Coast Guard: A Unique Dispute Resolution Mechanism, supra*, at 453 n.47 (emphasis added). An RE-4 "not only prohibits reenlistment, but also indicates to private employers that the individual presented some type of problem for the military." Heilman, *The Constitutionality of Discharging Homosexual Military Personnel*, 12 Colum. Hum. Rts. L. Rev. 191, 194 (1980-81).

*Keef*, relied on by the Court of Federal Claims, App. 19a-21a, is plainly inapposite. That case rejected a claim that an RE-2 was stigmatizing, noting that Keef

> has not indicated why he will be stigmatized. Innumerable reasons exist for not permitting a serviceman to reenlist after he has been discharged for the government's convenience. Plaintiff's discharge form does not indicate any derogatory reasons for denying him the opportunity to re-enlist, and we find therefore that, standing alone, the mere fact that he cannot re-enlist is not a stigma.

In contrast, Chief Vierrether received an RE-4, which is plainly more emphatic a bar than an RE-2. "Any code other than RE-1 might cause an employer to wonder about a veteran's military service," David F. Addlestone *et al.*, *Military Discharge Upgrading and Introduction to Veterans Administration Law* § 7.2.2.1, at 7/9 (1982), and "even though some non-RE-1 codes do not actually stand for something bad," *id.* & n.50a, employers well know that an RE-4 makes a strong statement about the service's feelings on the matter. *See* Joost & Battaglia, *supra*. Not so

with the RE-2 at issue in *Keef*.

An RE-4 in the specific case of a chief petty officer with nearly 18 years of active duty is a red flag that something was seriously wrong with his military service. As one perceptive commentator observed nearly 20 years ago:

> Even an Honorable Discharge after eighteen years of service would have been a severe punishment since involuntary release of a senior enlisted man would inevitably raise questions in the minds of prospective employers.

Andrew S. Effron, *Punishment of Enlisted Personnel Outside the UCMJ: A Statutory and Equal Protection Analysis of Military Discharge Certificates*, 9 Harv. Civ. Rgts.—Civ. Lib. L. Rev. 227, 254 (1974). Thus, Chief Vierrether's RE-4 not only precluded his reentry into the military—enough, in itself, to trigger the Due Process Clause—but also adversely affected his ability "to take advantage of other employment opportunities." *See Paul v. Davis, supra*, at 710, *quoting Board of Regents v. Roth*, 408 U.S. 564, 573 (1972); *cf. Loudermill, supra*, at 543, *citing Lefkowitz v. Turley*, 414 U.S. 70, 83-84 (1973) (fired worker's search for other employment "likely to be burdened by questionable circumstances under which he left his previous job").

RE-4s are stigmatizing. That stigma is all the more palpable where, as here, the recipient is a career enlisted member. Even if the Coast Guard could "suspend" its regulations guaranteeing a predischarge evidentiary hearing, Chief Vierrether was still entitled to such a hearing as a matter of due process. Certiorari should be granted because of the importance of this issue and the number of persons potentially affected by it.

## Conclusion

For the foregoing reasons, certiorari should be granted.

Respectfully submitted.

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